MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. PEN-15-555

DAY'S AUTO BODY, INC.,	)	
	)	
Plaintiff/Appellant	)	
	)	
v.	)	**ON APPEAL FROM THE**
	)	**SUPERIOR COURT,**
TOWN OF MEDWAY	)	**PENOBSCOT COUNTY**
and EMERY LEE AND SONS,	)	
INC.,	)	
	)	
Defendants/Appellees	)	

BRIEF OF APPELLEE EMERY LEE AND SONS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

According to the First Amended Complaint filed by Plaintiff Day's Auto Body Inc.,[1] this case arises out of a fire at Plaintiff's business location on October 3, 2011, in Medway, Penobscot County, Maine. (A. 35.) Count I asserts a claim of negligence against Defendant Town of Medway, while Count II asserts a claim of negligence against Defendant Emery Lee and Sons, Inc. and against the Town of Medway. (*Id.* at 35-38.) Both claims are focused on how the Defendants responded to the fire at Plaintiff's business location. (*Id.*)

Both Defendants moved for summary judgment, claiming that they were entitled to immunity under the Maine Tort Claims Act. On March 5, 2015, the trial court granted both motions for summary judgment. (A. 23-34.) Plaintiff subsequently moved for reconsideration of the trial court's order with respect to the issue of whether Emery Lee and Sons, Inc. was acting as an employee of the Town of Medway for purposes of immunity under the Maine Tort Claims Act. On September 9, 2015, the trial court denied the Plaintiff's motion for reconsideration. Plaintiff then filed this appeal.

The following facts contained within the summary judgment record

[1] By referring to the Plaintiff's Amended Complaint, Defendant Emery Lee and Sons, Inc. does not admit to any of its material allegations and reserves the right to contest any and all facts alleged by the Plaintiff in the event that this Court vacates the summary judgment in favor of Defendant.

are relevant to this appeal. Emery Lee is the owner and manager of Emery Lee & Sons, Inc., a general contracting and excavating business with its principal business office located at 936 Central Street, Millinocket, Maine. (A. 39, 50.) Richard Day, Sr. is the President and a shareholder of Day's Auto Body, Inc., a corporation which has been in existence for almost 30 years in the Town of Medway. (A. 52, 63.) Mr. Day was at the scene of the fire from the time it broke out at around 9:00 a.m. on October 3, 2011 until the fire was finally extinguished and for a long period thereafter. (A. 53, 69.)

On October 3, 2011, at or about 11:30 a.m., Emery Lee was referred a call from his daughter, Cathy Small, asking whether he was available to send an excavator over to the fire at Day's Welding and Machine in the Town of Medway, if needed. (A. 40, 50.) Cathy Small is an employee of Emery Lee and Sons, Inc. and has no affiliation with the Town of Medway. (A. 53, 69.) Emery Lee received a call from the Medway Fire Department directing him to report to the fire scene to assist with putting out the fire. (A. 40.)[2] Emery Lee took a large backhoe to the scene of the fire on a flatbed, arriving sometime between noon and 1:00 p.m. (A. 40, 51.)

[2] Plaintiff qualified this fact by asserting that "Mr. Lee's affidavit does not indicate who he spoke with from the Medway Fire Department." (A. 50.) However, Plaintiff failed to support his qualification with any record citation to admissible evidence. M.R. Civ. P. 56(e), (h)(2), (h)(4). Furthermore, the qualification is irrelevant and immaterial.

At the direction of the Medway Fire Department, Emery Lee was instructed to begin taking down walls of the involved building in an effort to get the fire under control and assist in suppressing the flames. (A. 40.)[3] When Emery Lee arrived, the building was heavily involved with flames shooting as high as thirty to forty feet into the air. (A. 40.)[4] The roof of the building had burned away or collapsed inside of the walls of the remaining structure. (*Id.* and n. 4) The remaining walls of the building were not much higher than 12-14 feet high. (*Id.* and n. 4.)

Emery Lee was directed by a uniformed member of the Medway Fire Department to use his machine to pull the remaining walls of the building inside the perimeter of the building to aid the firemen in extinguishing the flames and to confine the area inside the footprint of the building. (*Id.* at

[3] Plaintiff qualified this fact by asserting that "Mr. Lee's affidavit does not indicate who from the Medway Fire Department gave him those instructions." (A. 51.) However, Plaintiff failed to support this qualification with any record citation to admissible evidence. M.R. Civ. P. 56(e), (h)(2), (h)(4). Furthermore, the qualification is irrelevant and immaterial. Plaintiff further qualified this fact by adding that "[b]y the time Emery Lee arrived at the scene, the fire had largely subsided" and that "[a]ll that remained for walls when Emery Lee arrived were not more than 6 feet high." (A. 51.) To the extent that there is a dispute of fact about the intensity of the fire when Emery Lee arrived or how high the remaining walls were, this dispute is immaterial to the question of Defendant's immunity under the Maine Tort Claims Act.

[4] Plaintiff denied this fact and cited to portions of Mr. Day's affidavit, but did not include any facts in the body of its opposing statement of facts in support of its denial. (A. 51.) Therefore, the qualification did not effectively controvert the Defendant's proffered fact. *See Lubar v. Connelly,* 2014 ME 17, ¶ 34, 86 A.3d 642 (facts not set forth in the statement of material facts are not in summary judgment record, and court will disregard facts stated in portions of affidavit or record other evidence that are not stated in statement of material facts itself)

41.)[5] Emery Lee brought his backhoe into an opening in one of the exterior walls a distance of about ten feet; and, from that location, he could extend his boom, which has a thirty foot maximum reach, to access most of the interior of the building. (A. 41.)[6]

Mr. Day, the property owner, was present at the scene the entire time Emery Lee was there. (A. 40, 51.) Mr. Day at no time expressed concern about the manner in which Emery Lee was responding to the directions given him by the fire department. (A. 41.)[7] At one point, Emery Lee was asked by Mr. Day to try to extricate a fireproof filing cabinet from within the building. (A. 41, 51.) Emery Lee was able to use the backhoe with the "thumb" attachment to pick up and pull out the file cabinet and to rotate the backhoe to place the cabinet on the ground a distance of about twenty feet from what remained of the front of the building. (*Id.*) Emery Lee heard nothing else from Mr. Day, or the fire chief, or any personnel of the fire department about making efforts to save personal property within what remained of the building. (*Id.*)

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[5] Plaintiff denied this fact but did not include any facts in support of its denial. (A. 51.) *See* n. 2, *supra*. Plaintiff also noted that "Mr. Lee's affidavit does not indicate who from the Medway Fire Department gave him those instructions." (A. 51.) This statement is unsupported by a record citation and is irrelevant and immaterial. *See* n. 2, *supra*.

[6] Plaintiff denied this fact but did not include any facts in support of its denial. (A.51.) *See* n. 4, *supra*.

[7] Plaintiff denied this fact but did not include any facts in support of its denial. (A. 51.) *See* n. 4, *supra*.

The Medway Fire Department did tell Emery Lee not to disturb a pickup truck in one of the bays of the structure as, according to the expressed belief of the fire department member directing the efforts, that was where the fire appeared to have started. (A. 42.)[8] Emery Lee did not touch the pickup truck. (*Id.*)[9]

With his backhoe, Emery Lee was directed to and did pick up a large carrying beam which was in the debris field which appeared to have been positioned down the center of the building, and he proceeded to move it outside of the perimeter of what remained of the building. (A. 42.)[10] Emery Lee also pulled wood, which appeared to have been stacked up against an exterior wall of the building, away from the building to keep it from being ignited by the heat and flames of the fire. (*Id.* and n. 10.)

Because of the heat generated by the fire and volume of the water being applied, it was difficult to see clearly given the steam, ash, and dust above and around the area of the fire scene. (A. 42.)[11] Emery Lee did

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[8] Plaintiff qualified this fact by asserting that "Mr. Lee's affidavit does not indicate who from the Medway Fire Department gave him those instructions." (A. 51.) This qualification is irrelevant and immaterial and does not controvert the stated fact. *See* n. 2, *supra*.

[9] Plaintiff qualified this fact but did not include any facts in support of its qualification. (A. 51.) *See* n. 4, *supra*.

[10] Plaintiff qualified this fact by asserting that "Mr. Lee's affidavit does not indicate who gave him that direction." (A. 51.) This qualification is irrelevant and immaterial and does not controvert the stated fact. *See* n. 2, *supra*.

[11] Plaintiff denied this fact but did not include any facts in support of its denial. (A. 51.) *See* n. 4, *supra*. Plaintiff also claimed that "Mr. Lee's affidavit does not support the assertion that throughout the entire fire suppression efforts, Mr. Lee was 'doing what he had been directed to

remove what he later understood to be an oil tank from the interior of the building; but, he was not able to see it from his vantage point due to the smoke, ash, and flames. (*Id.* and n. 11.) Neither the firefighters nor Mr. Day ever told Emery Lee that there was an oil tank in the building. (*Id.* and n. 11.) Throughout the entire fire suppression efforts, Emery Lee was doing what he had been directed to do. (*Id.* and n. 11.)

Four hours after Emery Lee began to work, the Medway Fire Department indicated to him that the fire was "pretty much under control," and that he could leave the scene. (A. 43.)[12]

As directed by the Town of Medway, Emery Lee submitted time for labor and use of his excavator in payment of the work that he had performed. (A. 43.)[13] A copy of the invoice in the amount of $1,000, together with a check receipt for the copy of the payment that he received from the Town, is attached to the Affidavit of Emery Lee as Exhibit A. (A. 43, 49.) Emery Lee and Sons, Inc. submitted a bill to the Town of Medway

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do'." (A. 51.) This claim is belied by the cited portion of Mr. Lee's affidavit, which states that "[t]hroughout the entire fire suppression efforts, I was doing what I had been directed to do." (A. 47.) Finally, Plaintiff claimed that "Mr. Lee's affidavit [does not] indicate who gave him any such directions." (A. 51.) This assertion is without merit. *See* n. 2, *supra*.

[12] Plaintiff qualified this fact but did not include any facts in support of its qualification. (A. 51.) *See* n. 4, *supra*. Plaintiff also asserted that "Mr. Lee's affidavit does not indicate who from the Medway Fire Department gave him that information." (A. 51.) This assertion is without merit. *See* n. 2, *supra*.

[13] Plaintiff qualified this fact by asserting that "Mr. Lee's affidavit does not indicate who from the Medway Fire Department gave him those instructions." (A. 52.) This qualification is irrelevant and immaterial and does not controvert the stated fact. *See* n. 3, *supra*.

for its work fighting the fire at Plaintiff's property based on 4 hours of work, from 12:30 p.m. to 4:30 p.m., at the hourly rate of $250.00 per hour for a total of $1,000.00. (A. 52, 68.)

It is Emery Lee's understanding and belief that he had been employed by the Town and directed by it to aid in extinguishing the fire, thereby aiding the fire suppression efforts.[14] At no time, including the time of the subject fire, did Emery Lee & Sons, Inc. act in the capacity as a subcontractor for the Town of Medway. (*Id.* at 39.)[15]

[14] Plaintiff objected to this fact, claiming that it sets forth a legal conclusion. (A. 52.) However, Mr. Lee's understanding of his role in fighting the fire on behalf of the Town is not a legal conclusion. Plaintiff also denied this fact but did not include any facts in support of its denial. (*Id.*) *See* n. 2, *supra*.

[15] Plaintiff objected to this fact, claiming that it sets forth a legal conclusion. (A. 50.) This objection is without merit. Plaintiff also qualified this fact but did not actually include any facts in support of this qualification. (*Id.*) *See* n. 4, *supra*.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Trial Court Erred in Granting Summary Judgment to Emery Lee and Sons, Inc.

   A. Whether the Trial Court Erred in Determining that Emery Lee and Sons, Inc. Was an Employee of the Town of Medway Under the Maine Tort Claims Act.

   B. Whether the Trial Court Erred in Determining that Emery Lee and Sons, Inc. Was Entitled to Discretionary Function Immunity Under the Maine Tort Claims Act.

   C. Whether the Trial Court Erred in Determining that Emery Lee and Sons, Inc. Was Not Required to Demonstrate the Absence of Liability Insurance Coverage on Summary Judgment

STANDARD OF REVIEW

This Court "review[s] a grant of a summary judgment de novo for errors of law" and will uphold a summary judgment if the evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Carroll v. City of Portland*, 1999 ME 131, ¶ 5, 736 A.2d 279 (punctuation omitted). "Whether a defendant is entitled to discretionary function immunity is a question of law that may be resolved by a summary judgment, absent a genuine dispute of material fact." *Id.*

SUMMARY OF ARGUMENT

In granting summary judgment to Defendant Emery Lee and Sons, Inc. (Emery Lee), the trial court found that Emery Lee was acting as an "employee," as that term is defined in the Maine Tort Claims Act (MTCA), during the fire at the business location of Plaintiff Day's Auto Body, Inc. (Day's Auto Body). The court further found that Emery Lee was entitled to discretionary function immunity for the negligence claim asserted against it and that Emery Lee was not required to show the absence of insurance in order to receive a summary judgment in its favor. The trial court was correct on each of these three rulings.

Although Day's Auto Body contends that the MTCA definition of "employee" can never include a corporation, this claim is not supported by the plain language of the statute or by reference to the rules of statutory construction. The statute uses the word "person" in its definition of an employee, while excluding any person or other legal entity that is acting in the capacity of an independent contractor under contract to the governmental entity. Under Maine law, the use of the term "person" in a statute may include a corporation unless that construction is inconsistent with the plain meaning of the statute, the context otherwise requires, or the definitions otherwise provide. Therefore, any analysis of the MTCA's

definition of "employee" should begin with a presumption that its use of the term "person" can be understood to include a corporation.

Furthermore, the phrase "other legal entity" in the definition of "employee" is used only in connection with the exclusion for those who are operating as independent contractors under contract with a governmental entity. If a legal entity that is acting as an independent contractor cannot be an employee under the MTCA, then it follows that a legal entity can be an employee if it is not acting as an independent contractor.

When Emery Lee responded to the fire, it was not under any contract with the Town. It also did not act as an independent contractor during its response to the fire. Based on the eight factors that this Court employs in deciding whether a person is an employee or an independent contractor, it is clear that Emery Lee was acting as an employee. Most importantly, Emery Lee was acting at the direction and under the control of the Medway Fire Department. Although Day's Auto Body believes there is a genuine issue of material fact as to whether Emery Lee was an employee or an independent contractor, the material facts are not in dispute on this issue. Seven of the eight factors weigh in favor of a finding that Emery Lee was acting as a Town employee when he assisted in the fire-fighting efforts of the Medway Fire Department. Therefore, the trial court did not err in concluding that Emery Lee was an employee under the MTCA.

The trial court also correctly found that Emery Lee was entitled to discretionary function immunity for his role in aiding the Medway Fire Department in its response to the fire. Fire-fighting is a core component of the uniquely governmental activity of ensuring public safety. Firefighters are required to exercise their judgment and expertise as to how they respond to an emergency situation. The decisions and activities of firefighters are not ministerial acts because they do not resemble the decisions and activities carried on by people generally. Instead, fire-fighting involves discretionary decisions that are integral to the accomplishment of the uniquely governmental task of ensuring public safety. Because the actions taken by Emery Lee involved the exercise of judgment and expertise in the performance of this uniquely governmental task, the trial court did not err in concluding that Emery Lee was entitled to discretionary function immunity.

Finally, the trial court properly concluded that Emery Lee was not required to prove the absence of insurance in order to obtain summary judgment. While the MTCA does include a provision that waives immunity for a governmental entity when there is available insurance, it does not include any similar provision that waives immunity for employees when there is insurance.

Nevertheless, Day's Auto Body relies on a section of the MTCA that shifts the burden of providing for an employee's defense and indemnification from a governmental entity to a private insurer when the claim against the employee involves the use of a motor vehicle. However, this section applies only if the employee is potentially liable for the claim against it. It does not apply when the employee is immune from liability. Had the Legislature intended that available insurance coverage would operate as a waiver of an employee's discretionary function immunity, it could have enacted a provision that clearly accomplished this intention, just as it did with respect to governmental entities with insurance coverage.

For all of these reasons, the trial court did not err in entering summary judgment in Emery Lee's favor and this Court should affirm that summary judgment.

ARGUMENT

I. The Trial Court Did Not Err in Granting Summary Judgment to Emery Lee and Sons, Inc.

In its Order on the Defendants' motions for summary judgment, the trial court correctly concluded that Emery Lee was acting as an employee of the Town and was entitled to discretionary function immunity under the Maine Tort Claims Act, 14 M.R.S. §§ 8101-8118 (MTCA). The trial court also properly found that Emery Lee was not required to demonstrate the absence of insurance on summary judgment.

A. The Trial Court Did Not Err in Determining that Emery Lee and Sons, Inc. Was an Employee of the Town of Medway Under the Maine Tort Claims Act.

Under the MTCA, an "employee" is defined, in relevant part, as "a person acting on behalf of a governmental entity in any official capacity, whether temporarily or permanently, and whether with or without compensation from local, state or federal funds." 14 M.R.S. § 8102(1). However, "the term 'employee' does not mean a person or other legal entity acting in the capacity of an independent contractor under contract to the governmental entity." *Id.* As the trial court observed, "[a]ccording to this broad definition, Lee would be an employee unless the company were

deemed to be an independent contractor." (A. 32.)[16]

The court then considered the factors set forth in *Murray's Case*, 130 Me. 181, 154 A. 352 (1931), and found that they weighed in favor of a finding that Emery Lee was acting as an employee of the Town while working to assist in the fire suppression efforts. (A. 32-34.)

Nevertheless, Day's Auto Body first argues that "a corporation can never be an 'employee' under the language of Section 8102(1)." (Blue Br. at 16.) According to Day's Auto Body, "[u]nder the plain language of Section 8102(1) an 'employee' can only be a 'person,' as distinguished from some 'other legal entity'." (*Id.* at 16-17.) This argument is without merit.

First, 1 M.R.S. § 72 governs "the construction of statutes relating to words and phrases, unless such construction is inconsistent with the plain meaning of the enactment, the context otherwise requires or definitions otherwise provide." Pursuant to subsection 15 of this statute, a "'[p]erson' may include a body corporate." Thus, this Court's analysis should begin with the presumption that the use of the term "person" in section 8102(1) of the MTCA can be understood to include a corporation.

Second, the phrase "other legal entity" in section 8102(1) is included only in that portion of the definition of "employee" that excludes an

[16] *See also Kennedy v. State*, 1999 ME 85, ¶ 8, 730 A.2d 1252 ("While interpreting whether a party is an employee within the meaning of the MTCA, [this Court has] characterized the definition of employee as 'broad'.")

independent contractor from that definition. Specifically, it is only when a legal entity is "acting in the capacity of an independent contractor under contract to the governmental entity"[17] that the legal entity is excluded from the definition of an "employee." If a legal entity that *is* acting in the capacity of an independent contractor *cannot* be an employee under the MTCA, it logically follows that a legal entity that is *not* acting as an independent contractor *can* be an employee.

Indeed, in its Order on Plaintiff's motion for reconsideration, the trial court properly applied "[t]wo well-rooted rules of statutory construction" to the question of whether the definition of "employee" in section 8102(1) can include a corporation. (A. 15-17.) According to the court:

> The first rule is expressed in the maxim *expressio unius est exclusio alterius*—the mention of one thing in the exclusion of the other. *See Musk v. Nelson*, 647 A.2d 1198, 1202 (Me. 1994). Whereas section 8102(1) mentions that an "employee" is a "person," the section later indicates that an "employee" is not a person *or other legal entity* acting in the capacity of an independent contractor." ... The Court recognizes that the [L]egislature made a single exception to the definition of "employee"—that being a "person or other legal entity *acting in the capacity of an independent contractor*." There is no other exception for "legal entities" generally. The Court can therefore conclude that the Legislature did not envision any exception to the definition of "employee besides for those actors "acting in the capacity of an independent contractor." Therefore, it seems that "legal entities" *not* acting in the capacity of an independent contractor could be "employees." This rule of construction tends to show that Lee, Inc. can [be] an employee despite its corporate status.

[17] There is no evidence that Emery Lee was "acting ... under contract to" the Town when Mr. Lee was called to respond to the fire.

(*Id.* at 15-16.) The court further explained that:

> The second rule of statutory construction raised here is the "rule against superfluidity" or the "rule against surplusage." "Surplusage occurs when a construction of one provision of a statute renders another provision unnecessary or without meaning or force." *Home Builders Ass'n of Me., Inc. v. Town of Eliot*, 2000 ME 82, ¶ 8. Courts should refuse to construe statutes in such a way that would render a word, phrase, or section superfluous. *See e.g. Opinion of the Justices*, 460 A.2d 1341, 1346 (Me. 1982). For the Court to accept the Plaintiff's contention—that a legal entity can never be an "employee"—would contravene this rule against surplusage. To illustrate, and as shown above, the definition of "employee" expressly excludes "a person or other legal entity acting in the capacity of an independent contractor." 14 M.R.S. § 8102(1). If companies or legal entities are never "employees," as is the Plaintiff's argument, then the phrase "acting in the capacity as an independent contractor would be superfluous—there would be no need for the Legislature to insert the phrase. The Legislature could have accomplished the same effect by expressing that "employee" does not include a "legal entity," period. However, the Legislature included the explanatory phrase—"acting in its capacity as an independent contractor," which indicates to this Court that the Legislature's focus was on the actor's function, not his corporate identity. ... This rule of construction tends to show that Lee, Inc. can be an "employee" despite its corporate status.

(*Id.* at 16-17.) Thus, as the trial court correctly reasoned, the application of these two statutory rules of construction leads to the inevitable conclusion that a legal entity that is not acting in the capacity of an independent contractor can be an "employee" under the MTCA.[18]

The second argument that Day's Auto Body asserts on appeal is that there is a genuine issue of material fact as to whether Emery Lee acted as an employee or an independent contractor in assisting the Town in its fire

[18] Day's Auto Body does not even attempt in its brief to address the trial court's application of these two rules.

suppression efforts. (Blue Br. at 17.) Again, this argument is without merit.

Under Maine law, there are eight factors to be considered in determining whether someone is an employee or an independent contractor. *Legassie v. Bangor Pub. Co.*, 1999 ME 180, ¶ 5 n.1, 741 A.2d 442. Those eight factors are as follows:

(1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;

(2) independent nature of the business or his distinct calling;

(3) his employment of assistants with the right to supervise their activities;

(4) his obligation to furnish necessary tools, supplies, and materials;

(5) his right to control the progress of the work except as to final results;

(6) the time for which the workman is employed;

(7) the method of payment, whether by time or by job;

(8) whether the work is part of the regular business of the employer.

Id. This Court has held "that control is the most important factor in determining whether an individual is an employee or an independent contractor. *Id.* ¶ 6. Furthermore, "the power to control includes the rights both to employ and to discharge subordinates and the power to control and direct the details of the work." *Id.* "The right to control the details of the

performance, present in the context of an employment relationship, must be distinguished from the right to control the result to be obtained, usually found in independent contractor relationships." *Id.*

In this case, there are no disputed facts with respect to these eight factors. First, there was no "contract for the performance … of a certain piece or kind of work at a fixed price."[19] Instead, Emery Lee was called during the fire to come aid in the fire suppression efforts and he responded. Second, this Court has explained that the two factors regarding the "independent nature of the business" and the "right to control the progress of the work" are about "the freedom of the employee or independent contractor to do the work without direction, so long as the work gets done." *Id.* ¶ 12. Here, the undisputed facts demonstrate that, during the time he was at the fire, Emery Lee acted at the direction and under the control of the Medway Fire Department.[20] In fact, in its First Amended Complaint,

[19] Day's Auto Body concedes this fact. (Blue Br. at 18.)

[20] Although Day's Auto Body claims that "Emery Lee and Sons, Inc. had the right to control the progress of the excavator work" (Blue Br. at 18), this assertion is not supported by the summary judgment record. Instead, the undisputed facts establish that Emery Lee acted at the direction of the Medway Fire Department and was given specific instructions about the work that he was asked to perform. For example, Mr. Lee was instructed to begin taking down walls of the building in an effort to get the fire under control and assist in suppressing the flames. (A. 40.) Mr. Lee was also directed to use his machine to pull the remaining walls of the building inside the perimeter of the building to aid the firemen in extinguishing the flames and to confine the area inside the footprint of the building. (*Id.* at 41.) He was told not to disturb a pickup truck that was located in one of the bays of the structure. (*Id.* at 42.) He was told to pick up a large carrying beam which was in the debris field. (*Id.*) Mr. Lee was also told when he could leave the scene after the Medway Fire Department concluded that the fire was "pretty much under control." (*Id.* at 43.)

Day's Auto Body expressly admitted that "Defendant Lee was acting at the direction of and on behalf of [the Town of] Medway." (A. 38.)

Third, Emery Lee did not employ any assistants while he was aiding in the fire suppression efforts.[21] Fourth, although he was only at the fire for several hours, the definition of "employee" in section 8102(1) of the MTCA includes someone who is acting only temporarily on behalf of a governmental entity. Fifth, Emery Lee was paid by the hour for his work at the fire, not by the job.[22] Sixth, the work that Emery Lee performed—aiding in the suppression of a fire and ensuring public safety—is part of the regular business of the Town.

The only factor that could possibly point to a finding that Emery Lee was an independent contractor is the fact that he brought his company's excavator to the site. Considering that all the other factors point to the conclusion that Emery Lee was acting as a Town employee, the trial court did not err in reaching that conclusion.

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[21] Day's Auto Body asserts that Emery Lee and Sons, Inc. "had the right to employ assistants, if it deemed it necessary, with the right to supervise their activities." (Blue Br. at 18.) However, it points to no facts in the summary judgment record to support this assertion. Moreover, this particular factor is about the actual employment of assistants, not the "right" to employ them.

[22] Day's Auto Body contends that this payment was "far in excess of what a regular employee would have been paid for the same work." (Blue Br. at 18.) However, it points to no facts in the summary judgment record to support this assertion.

B. The Trial Court Did Not Err in Determining that Emery Lee and Sons, Inc. Was Entitled to Discretionary Function Immunity Under the Maine Tort Claims Act.

Section 8111(1)(C) of the MTCA provides, in relevant part, that "[n]otwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for … [p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused." According to this Court, "[w]hether a defendant is entitled to discretionary function immunity is a question of law." *Tolliver v. Dept. of Transp.*, 2008 ME 83, ¶ 16, 948 A.2d 1223.

This Court has explained that discretionary function immunity "serves the important purpose of separation of power by preventing the judicial branch from entertaining tort actions as tools for manipulating important policy decisions that have been committed to coordinate branches of government." *Id.* (quoting *Adriance v. Town of Standish*, 687 A.2d 238, 240 (Me. 1996).[23] Furthermore, this Court utilizes "a four-factor

[23] The purpose of discretionary function immunity has also been explained as follows:

> The complex process of the administration of government requires that officers and employees be charged with the duty of making decisions, either of law or of fact, and of acting in accordance with their determinations. It has traditionally been explained by the courts that public officers and employees would be unduly hampered, deterred and intimidated in the discharge of their duties, and as a result undesirable shackles would be imposed upon agencies of government, if those who act improperly or even exceed the authority given them were not protected in some reasonable degree by being relieved

test to aid in determining when discretionary function immunity applies," which is as follows:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objectives? (2) Is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Tolliver, 2008 ME 83, ¶ 19, 948 A.2d 1223. As the trial court observed (A. 27) and as Day's Auto Body has conceded (Blue Br. at 19), the only factor at issue in this case is the third factor.

Certain categories of employees are protected by discretionary function immunity. First, employees who are carrying out "a plan or policy developed at a high level of government" are entitled to discretionary function immunity. *Tolliver*, 2008 ME 83, ¶ 19, 948 A.2d 1223 (discussing *Darling v. Augusta Mental Health Inst.*, 535 A.2d 426 (Me. 1987). Second,

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> from private liability. The basis of the immunity has been not so much a desire to protect an erring officer as it has been a recognition of the need of preserving independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits. This, together with the manifest unfairness of placing any person in a position in which he is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of hindsight, has led to a general rule that tort liability should not be imposed for conduct of a type for which the imposition of liability would substantially impair the effective performance of a discretionary function.

RESTATEMENT (SECOND) OF TORTS § 895D cmt. b.

"where the alleged negligent acts involved discretionary decisions that were integral to the accomplishment of a uniquely governmental policy or program," this Court has concluded that discretionary function immunity applies. *Id.* (discussing *Roberts v. State*, 1999 ME 89, 731 A.2d 855); *see also Hilderbrand v. Washington County Commissioners*, 2011 ME 132, ¶ 15, 33 A.3d 425 (same).

Discretionary function immunity does not apply to "ministerial acts," which are "those acts to be carried out by employees, by the order of others or of the law, with little personal discretion as to the circumstances in which the act is done." *Jorgensen v. Dept. of Transp.*, 2009 ME 42, ¶ 16, 969 A.2d 912 (quotations omitted). A ministerial act is one that "has little or no purely governmental content but instead resembles decisions or activities carried on by people generally," including "operational decisions, such as those regarding the safety or maintenance of premises." *Id.* As this Court has explained, "[a] *discretionary* act requires judgment or choice, whereas a *ministerial* act is mandatory and requires no personal judgment or choice." *Carroll v. City of Portland*, 1999 ME 131, ¶ 9, 736 A.2d 279 (emphasis in original). Thus, a government employee "is not entitled to discretionary function immunity unless his allegedly tortious activity required the exercise of judgment or choice." *Id.*

It can be difficult to ascertain the difference between a discretionary

act and a ministerial act. Indeed, as one author has noted, "[t]rying to draw a line between a discretionary policy/planning decision and a non-discretionary, ministerial/operational decision is as arbitrary as trying to identify the point on the visible spectrum where green turns to yellow." John C. Sheldon, *The Curious Case of Jorgensen v. Department of Transportation*, 24 Me. Bar J. 182, 184 (2009). Because of this difficulty, it is helpful to review those cases in which this Court decided that a challenged action was protected by discretionary function immunity and those in which this Court concluded that the challenged action was a ministerial act.

In fact, the trial court engaged in this very analysis, summarizing the relevant cases as follows:

> The decision of a corrections officer to close a cell door and thereby sever the finger of a prisoner was ruled to constitute a discretionary decision or action related to the legitimate governmental function of management and care of prisoners. *Roberts v. State*, 1999 ME 89 ¶ 9, 10, 731 A.2d 855. Similarly, the action of a jail guard in slapping a restrained prisoner on the buttocks related to a similar legitimate function and was determined to constitute a discretionary activity. *Erskine v. Comm'r of Corrections*, 535 A.2d 238, 240 (Me. 1987). A police officer's decision to initiate and conduct a high speed chase constituted a discretionary decision and act related to the legitimate governmental function of law enforcement in *Selby* [*v. Cumberland County*], 2002 ME 80, ¶ 10, [948 A.2d 1223], as did a police dispatcher's failure to inform officers that a person was suicidal in *Doucette v. City of Lewiston*, 1997 ME 157, ¶ 6, 697 A.2d 1292, 1294, an officer's decision to respond in an emergency manner to a particular complaint in *Norton v. Hall et al.*, 2003 ME 118 ¶ 7, 834 A.2d 928, 931, and an officer's decision to not tell prospective foster

> parents that the foster child they were adopting had made false sexual abuse claims against foster parents in the past was a discretionary function. *Polley v. Atwell*, 581 A.2d 410, 413 (Me. 1990). Finally, although not binding precedent, a teacher's supervision of students' after-school activity on the playground also satisfies the requirements of a discretionary function. *Fiandaca ex Rel. Peterson v. City of Bangor*, 2002 WL 1335843 (Me. Super. Ct., June 5, 2002).[24]
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> * * *
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> Case law has defined the concept of a non-discretionary, or ministerial, function. The decision by a government employee whether to open a trash hopper did not rise to the level of a discretionary function, *Adriance v. Town of Standish*, 687 A.2d 238, 240 (Me. 1996), nor did the decision of a town clerk to not install a handrail on the stairs to her office located in her home, *Rodriguez* [*v. Town of Moose River*], 2007 ME 68, ¶¶ 23-24, [922 A.2d 484], which the court characterized as a decision that closely resembled one made by people generally. In two relatively recent decisions involving the Maine Department of Transportation, the actions of employees responsible for laying down striping on the road edge were not the kind of governmental policy decisions or judgments to which discretionary function immunity applied, *Tolliver*, 2008 ME 83 ¶ 23; and the decisions involved in setting up a construction zone involving the use of flaggers and cones to restrict traffic in the zone to one lane are not the types of decisions informed by public policy considerations, and discretionary function immunity does not apply. *Jorgensen v. Dep't of Transp.*, 2009 ME 42, ¶ 19, 969 A.2d 912, 918.

(A. 28-29.)

After contrasting those cases in which the challenged actions were protected by discretionary function immunity with those cases in which the challenged actions were considered ministerial acts, the trial court

[24] *See also Chiu v. City of Portland*, 2002 ME 8, ¶¶ 17-24, 788 A.2d 183 (discretionary function immunity protects the determination of the scope of an initial building inspection and the decision as to when and how to reinspect buildings); *Hilderbrand*, 2011 ME 132, ¶¶ 8-20, 33 A.3d 425 (county sheriff's public statements about decision to stop working with the Maine Drug Enforcement Agency were protected by discretionary function immunity).

"conclude[d] that the decisions and activity involved in fighting a fire are unlike those in striping a road, deciding whether to install a railing or open a trash hopper, or even in setting up a construction safety zone." (*Id.* at 29.)

As the court explained:

> To successfully extinguish a fire, the governmental employee must be familiar with fairly sophisticated equipment, be versed in safety procedures, be aware of the dynamics of how fire spreads and how to best suppress it, be familiar with the dangers posed by the unique characteristics of what is being burned such as flammables and dangerous chemicals, and be aware of the effects of wind and weather on the progress of the fire, as well as countless other variables. Additionally, the employee must apply that knowledge and expertise to fighting any number of different types of fires employing various suppression strategies, and employ them in a manner that assures the safety of the firefighter and the general public.

(*Id.* at 29-30.) Consequently, the trial court was unable to "conclude that fighting a fire involves ministerial acts 'to be carried out with little personal discretion as to the circumstances under which the act is to be done'." (*Id.* at 30) (quoting *Tolliver*, 2008 ME 83, ¶ 23.)

With respect to Emery Lee in particular, the trial court found that "[w]hile assisting in the suppression of this fire, Lee was engaging in the same type of activities as the Town's firemen, the only significant difference being that Lee was using an excavator and the others were not." (*Id.* at 32.) In fact, in performing the fire suppression work that he was directed to do, Mr. Lee had to exercise his judgment and expertise as to where to best

position his machine, the order in which to knock down the walls of the building, and the best methods for limiting the area of the fire in order to contain it. The activity in which he was engaged—aiding in the fire suppression efforts of the Medway Fire Department—does not resemble activities that are carried on by people generally. Instead, it requires the use of personal judgment or choice that is integral to the accomplishment of a uniquely governmental policy or program—fighting fires in the interest of public safety. Therefore, Emery Lee is entitled to discretionary function immunity.

Several state courts that have examined the issue have held that fire-fighting activities involve discretionary acts that are protected by discretionary function immunity. For example, as the Florida Supreme Court has explained:

> The decisions of how to properly fight a particular fire, how to rescue victims in a fire, or what and how much equipment to send to a fire, are discretionary judgmental decisions which are inherent in this public safety function of fire protection. A substantial majority of jurisdictions that have addressed the issue of governmental liability for asserted negligent conduct in responding to and fighting fires have reached this same conclusion. ...To hold a city liable for the negligent decisions of its fire-fighters would require a judge or jury to second guess fire-fighters in making these decisions and would place the judicial branch in a supervisory role over basic executive branch, public protection functions in violation of the separation of powers doctrine.

City of Daytona Beach v. Palmer, 469 So.2d 121, 123 (Fla. 1985) (collecting

cases).

Similarly, the Indiana Court of Appeals has noted that "the definition of a discretionary duty includes the determination of how an act should be done." *City of Hammond v. Cataldi*, 449 N.E.2d 1184, 1187 (Ind. App. 1983). Furthermore, "decisions as to how to fight a particular fire require that judgments be made regarding appropriate methods and techniques for the unique situation presented by that fire." *Id. See also Willis v. Warren Township Fire Dept.*, 650 N.E.2d 321, 325 (Ind. App. 1995) (under the planning/operational test, on-site decisions regarding allocation of resources and implementation of particular fire-fighting strategies are discretionary functions, as such decisions necessarily involve the conscious balancing of risks and benefits associated with policy formulation); *Leo Machine & Tool, Inc. v. Poe Volunteer Fire Dept., Inc.*, 936 N.E.2d 855, 859-863 (Ind. App. 2010) (fire-fighting strategy and excavation actions were discretionary functions).

Additionally, although it was not a case about discretionary function immunity, a recent decision from the United States District Court for the District of Maine provides a helpful statement about the discretionary nature of municipal fire-fighting:

> Municipal fire-fighting involves … discretionary decisionmaking based on a vast array of subjective, individualized assessments … and … a remarkable breadth of discretion. Firefighters attacking a blaze

> must make sometimes split-second decisions concerning a wide variety of circumstances, including the nature of the building and its contents, its accessibility, available firefighting resources (water; length of reach of ladder-trucks; personnel), how far the fire has progressed, and danger to life and property—in the burning building, surrounding structures, and to the firefighters themselves.

Cousins v. Higgins, 2015 WL 3755272 (D. Me. June 15, 2015) (internal citations and quotations omitted).

Finally, this Court has expressly rejected the understanding of discretionary function immunity that Day's Auto Body asserts on appeal, which is that it applies only to policy-making decisions. *See Selby*, 2002 ME 80, ¶ 11 & n. 9, 796 A.2d 678. In fact, this Court "decline[d] [the plaintiff's] invitation to overturn *Doucette* and settled law in Maine and follow decisions of the federal courts interpreting the Federal Tort Claims Act, and some state courts interpreting their own acts." *Id.* ¶ 11. For that reason, Plaintiff's reliance on cases from state courts that afford immunity only to policy-making decisions is misplaced.

Neither the Court's decision in *Tolliver* nor its decision in *Jorgensen* overruled decades of Maine jurisprudence on discretionary function immunity. Instead, in both cases, this Court stressed the difference between discretionary governmental acts protected by discretionary function immunity and "ministerial acts" that involve "little or no purely governmental content" and that "[resemble] decisions or activities carried

on by people generally." *Tolliver*, 2008 ME 83, ¶ 21, 948 A.2d 1223; *Jorgensen*, 2009 ME 42, ¶ 16, 969 A.2d 912. The decisions made while fighting fires and ensuring public safety involve purely governmental conduct and do not resemble decisions or activities carried on by people generally. Therefore, unlike the decisions made in completing a road improvement project, which are decisions that any governmental or nongovernmental actor can make, the decisions made while fighting a fire are not ministerial acts.

Because fire-fighting activities necessarily involve the exercise of judgment and expertise in the accomplishment of the uniquely governmental policy or program of ensuring public safety through fighting fires, the trial court did not err in concluding that Emery Lee's efforts in fighting and containing the fire at the Plaintiff's business location are protected by discretionary function immunity.

C. The Trial Court Did Not Err in Determining that Emery Lee and Sons, Inc. Was Not Required to Demonstrate the Absence of Liability Insurance Coverage on Summary Judgment.

Relying on 14 M.R.S. § 8112(9), Day's Auto Body contends that Emery Lee was obligated in its motion for summary judgment to show that it lacked insurance coverage for the negligence claim against it.[25] (Blue Br. at

[25] Day's Auto Body did not raise this argument in its opposition to Emery Lee's motion for summary judgment. Instead, the issue was raised for the first time when Day's Auto Body

21-23.) Section 8112(9) provides as follows:

> **9. Certain suits arising out of use of motor vehicles.** A governmental entity is not required to assume the defense of or to indemnify an employee of that governmental entity who uses a privately owned vehicle, while acting in the course and scope of employment, to the extent that applicable liability insurance coverage exists other than that of the governmental entity. In such cases, the employee of the governmental entity and the owner of the privately owned vehicle may be held liable for the negligent operation or use of the vehicle but only to the extent of any applicable liability insurance, which constitutes the primary coverage of any liability of the employee and owner and of the governmental entity. To the extent that liability insurance other than that of the governmental entity does not provide coverage up to the limit contained in section 8105, the governmental entity remains responsible for any liability up to that limit.

Day's Auto Body further relies on *Napier v. Town of Windham*, 187 F.3d 177 (1st Cir. 1999) and *Berard v. McKinnis*, 699 A.2d 1148 (Me. 1997) for the proposition that "[b]ecause governmental immunity is an affirmative defense, the entity bears the burden of establishing that it had no insurance coverage for the plaintiff's claims." (Blue Br. at 21.)

However, Day's Auto Body is confusing § 8112(9) with § 8116. Section 8116 provides, in relevant part, as follows:

> The legislative or executive body or any department of the State or any political subdivision may procure insurance against liability for any claim against it or its employees for which immunity is waived under this chapter or under any other law. If the insurance provides protection in excess of the limit of liability imposed by section 8105, then the limits provided in the insurance policy shall replace the limit imposed by section 8105. ***If the insurance provides coverage***

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moved for reconsideration of the summary judgment. Because it was not properly preserved below, Emery Lee contends that Day's Auto Body has waived this argument on appeal.

> ***in areas where the governmental entity is immune, the governmental entity shall be liable in those substantive areas but only to the limits of the insurance coverage.***
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> * * *
>
> A governmental entity may purchase insurance or may self-insure on behalf of its employees to insure them against any personal liability for which a governmental entity is obligated or entitled to provide defense or indemnity under section 8112.

(Emphasis added.) Thus, section 8116 operates as a waiver of immunity for a *governmental entity*[26] to the extent of any applicable insurance. However, neither section 8116 nor section 8112 operates as a waiver of personal immunity for governmental *employees*. *Moore v. City of Lewiston*, 596 A.2d 612, 616 & n.10 (Me. 1991); *Grossman v. Richards*, 1999 ME 9, ¶ 14, 722 A.2d 371; *Napier*, 187 F.3d at 190-191.

As the trial court correctly observed, "nowhere in section 8112(9) is any indication that the section supersedes the unequivocal language in section 8111(1)(C) that governmental employees are 'absolutely immune from personal civil liability' for their performing a discretionary function." (A. 21.) The trial court also properly found that:

> the purpose of section 8112(9) is to merely shift the onus of defending a governmental employee away from the governmental entity and onto the employee's own insurer when an employee is accused of negligently operating a private motor vehicle. Nowhere does section 8112(9) impose another layer of liability on these employees.

[26] Under the MTCA, a "governmental entity" is defined as the State and its political subdivisions. 14 M.R.S. § 8102(2).

(*Id.*) Accordingly, "section 8112(9) does not make Lee liable. It operates *when* Lee is liable." (*Id.* at 21-22.)

In other words (and assuming for the sake of argument that Emery Lee's fire-fighting activities with the excavator can be considered the "use" of a "motor vehicle" as those terms were intended to be understood by the Legislature),[27] section 8112(9) could apply only if Emery Lee was not entitled to discretionary function immunity. In that case, section 8112(9) would shift the burden of defending and indemnifying Emery Lee from the governmental entity (the Town) to Emery Lee's private insurer—but only to the extent of such insurance.[28]

If the Legislature had intended to make section 8112(9) operate as a waiver of discretionary function immunity for governmental employees with private insurance, it could have clearly indicated as much. Indeed, section 8116 uses clear and unequivocal language to establish the waiver of immunity for governmental entities when there is insurance coverage available. By contrast, the plain language of section 8112(9) includes no mention of immunity or waiver of that immunity. Consequently, it is

[27] See the trial court's discussion of the exception to immunity provided by 14 M.R.S. § 8104-A(1), which involves the negligent use or maintenance of motor vehicles. (A. 25-27.) Because Emery Lee's use of the excavator in this case did not involve a risk of collision, it is not clear that such use was the type contemplated by the Legislature in section 8112(9).

[28] *But see* 14 M.R.S. § 8104-D (personal liability of governmental employees is limited to $10,000).

unreasonable to conclude that section 8112(9) was intended to waive a governmental employee's discretionary function immunity.

For these reasons, the trial court did not err in concluding that Emery Lee was not obligated to demonstrate the absence of applicable insurance coverage in order to prevail on summary judgment.

CONCLUSION

For all of the reasons stated above, Emery Lee and Sons, Inc. respectfully asks this Court to affirm the trial court's entry of summary judgment in its favor.

DATED at Bangor, Maine this 1st day of March, 2016.

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CERTIFICATE OF SERVICE

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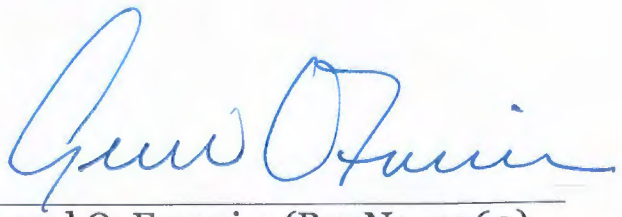

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